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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRETT ALAN MAY, Defendant and Appellant.	E073498 (Super.Ct.No. RIF100589) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Marilee Marshall, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Lise S. Jacobson and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

In 2001, appellant Brett May and his codefendant Terrell Law committed a home invasion robbery, during which one of them shot and killed one of the residents. In 2006, May and Law were tried jointly before two separately empaneled juries who found them both guilty of first degree felony murder with the special circumstance described in Penal Code section 190.2, subdivisions (a)(17)(A) and (d).[1] May's jury found he personally and intentionally used a firearm during the murder, and in finding the special circumstance allegations true, they concluded he was "a major participant" in the underlying robbery and acted "with reckless indifference to human life." (§ 190.2, subd. (d); unlabeled statutory citations refer to the Penal Code.) The trial court sentenced him to 19 years 4 months, followed by a term of life without the possibility of parole.

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), which, among other things, amended the definition of felony murder in section 189. Under the new law, an accomplice to the underlying felony who was not the actual killer cannot be convicted of felony murder unless they aided in the murder with the intent to kill or were "a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189.) The legislation also added section 1170.95, which establishes a procedure for vacating murder convictions predating the amendment that could not be sustained under the new definition of felony murder. (Stats. 2018, ch. 1015.)

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[1] We took judicial notice of the appellate record of May's and Law's criminal trial, case No. E041967. (Evid. Code, § 452, subd. (d).)

In this appeal, May challenges the trial court's summary denial of his section 1170.95 petition to vacate his murder conviction. He argues the trial court erred by reviewing his record of conviction and determining the jury's true finding on the special circumstance rendered him ineligible for relief. According to May, two California Supreme Court cases decided after he was convicted—*People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*)—clarified what "major participant" and "reckless indifference to human life" mean for purposes of section 190.2, subdivision (d) and therefore require us to conclude his special circumstance finding was not supported by sufficient evidence. As we explain, it is proper for a trial court to review the record of conviction when determining whether a section 1170.95 petitioner has stated a prima facie claim for relief. Additionally, even under the principles articulated in *Banks* and *Clark* after May was convicted, he undoubtedly qualifies as a major participant who acted with reckless indifference to human life, a conclusion that renders him ineligible for relief under section 1170.95.[2]

We therefore affirm the order denying his petition.

[2] We reached the same conclusions in the separate appeal filed by May's codefendant, Law. (Case No. E072845.)

I

FACTS

We take the facts from our unpublished 2008 opinion affirming May's and Law's convictions in case No. E041967. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134, 1138 (*Lewis*), review granted Mar. 18, 2020, S260598 [in determining the sufficiency of a section 1170.95 petition, the court may review the record of conviction, which includes the opinion in a defendant's direct appeal].) The victim sold marijuana and kept his product as well as large sums of cash in a safe in the house he lived in with three other roommates. N., one of his regular customers, introduced him to May and brought May to his house a few times to buy marijuana. After seeing the house, May decided to rob the victim. N. refused to take part in the plan but Law agreed to help.

In the early morning hours of May 1, 2001, May and Law went to the victim's house and waited until one of his roommates left for work. Armed with guns and wearing ski masks, they entered the house and encountered R. (another roommate) sleeping on the couch. They woke R. up and ordered him to the floor. While the first defendant guarded R., the second defendant went to the victim's bedroom to wake him up. The victim owned a gun, but the second defendant took it. At the same time, the first defendant was ordering R. to hand over his jewelry.

When the second defendant returned to the living room with the victim, he was holding two guns, his and the victim's. He ordered the victim to the floor, then began searching the rest of the house for money and marijuana while the first defendant stood

guard in the living room. The second defendant found the safe in the victim's bedroom closet and came back to retrieve the victim. The victim refused to open the safe, so the first defendant brought R. into the room and ordered him to open it. When R. was unable to do so, the defendants ordered him to lie on the floor in the hallway.

Frustrated with the victim's resistance, the second defendant (the one holding two guns) pistol whipped the victim. The victim then ran into the bedroom of another roommate, A., turned on the lights, and screamed that defendants were "tripping." A. could tell the victim was panicked and scared. At that point, both defendants entered A.'s room, brandishing their guns. The second defendant tried to hit the victim with one of his guns but dropped it when the victim blocked the blow with his arm. The second defendant picked up the gun, cursed at the victim, and shot him in the head. According to A., the defendants fled after the gunshot, and he ran to a neighbor's house to call 911.

At the close of evidence, the prosecutor amended one of the firearm allegations against May, changing the allegation from one that he personally and intentionally *discharged* a firearm during the murder and attempted robbery (§ 12022.53, subd. (d)) to one that he personally and intentionally *used* a firearm (§ 12022.53, subd. (b)). May's jury convicted him of first degree felony murder with the special circumstance described in section 190.2, subdivisions (a)(17)(A) and (d); one count of attempted robbery; and two counts of assault with a firearm. They found true the allegations that a principal was armed with a firearm during the attempted robbery (§ 12022, subd. (a)) and that he personally and intentionally used a firearm during the murder and attempted robbery

(§ 12022.53, subd. (b)). Law's jury convicted him of first degree felony murder with the same special circumstance as May; one count of robbery; one count of attempted robbery; and two counts of assault with a firearm. As to the robbery and attempted robbery, they found true the allegation that a principal was armed with a firearm, but found not true the allegation that Law personally and intentionally discharged a firearm during the robbery. Under these verdicts, neither jury found beyond a reasonable doubt which defendant was the actual killer. Law's jury concluded the prosecution had failed to prove beyond a reasonable doubt that he was the killer, and May's jury found he used a gun during the murder, which is not the same as finding he *discharged* a gun during the murder. In other words, the juries did not make a specific determination as to who shot the victim, which is not surprising given that both defendants wore ski masks that covered their faces during the entire incident. The trial court sentenced Law to six years in prison plus life without the possibility of parole and sentenced May to 19 years 4 months in prison plus life without the possibility of parole.

In 2008, we affirmed May's and Law's convictions in case No. E041967. In that appeal, neither defendant argued the evidence was insufficient to support the special circumstances robbery-murder finding. In 2015 and 2016, the California Supreme Court decided *Banks* and *Clark*, respectively, which discuss when section 190.2 authorizes a special circumstance life without parole sentence for a felony-murder defendant convicted as an aider and abettor. (*Banks*, *supra*, 61 Cal.4th at p. 794; *Clark*, *supra*, 63 Cal.4th at pp. 609-610.) Significantly, our high court clarified that participation in an

armed robbery, on its own, is insufficient to support a finding that the defendant acted with reckless indifference to human life. "A sentencing body must examine the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime." (*Banks*, at p. 801.) "The defendant must be *aware of and willingly involved in* the violent manner in which the particular offense is committed," thereby "demonstrating reckless indifference to the significant risk of death his or her actions create." (*Ibid.*, italics added.)

In July 2019, May's counsel filed a section 1170.95 petition on his behalf, seeking to vacate his 2006 murder conviction. The petition alleged he had been convicted of first degree murder under a felony-murder theory and that he could not be so convicted under the new definition of felony murder because, under the principles articulated in *Banks* and *Clark*, he did not act with reckless indifference to human life during the course of the robbery. His petition detailed the evidence presented at his and Law's trial and compared that evidence to the facts of *Banks* and *Clark*, arguing his culpability was similar to the defendants in those cases. May attached to his petition our 2012 opinion deciding his direct appeal as well as a transcript of the prosecutor's closing argument at his trial.[3]

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[3] May attached the transcript to demonstrate that the prosecutor had argued Law, not he, was the actual killer, and as such, it was undisputed he was not the killer. But that is not an accurate characterization of the prosecutor's closing argument. What the prosecutor actually argued was "whether or not [May's] the one that pulled the trigger is not the dispositive issue" for the special circumstance allegation. He told the jury that in order to find the allegation true, they needed to find that he was a major participant in the robbery who acted with reckless disregard to human life.

The People filed an opposition to May's petition, arguing SB 1437 is unconstitutional and, in any event, he is not entitled to relief because the jury found he was a major participant in the robbery who acted with reckless disregard to human life, as defined in section 190.2, subdivisions (a)(17(A) and (d).

The court held a hearing on May's petition on August 2, 2019. May's counsel stated an evidentiary hearing was necessary because the jury's special circumstance finding occurred before *Banks* and *Clark*. She argued, "My client was a major participant, but the argument is that he was not—under today's law, he did not act with reckless indifference to life." The prosecutor responded that the evidence supported the jury's finding May acted with reckless indifference to human life under the *Banks* and *Clark* standard, adding, "If defense counsel wants to make an argument in a habeas petition under *Banks* that he is not a major participant or under reckless indifference, she has the ability to do so. *Banks* has been around for four years now." May's counsel indicated she planned to file a habeas petition if the court denied the section 1170.95 petition. The court denied May's petition on the ground the jury found he was a major participant in the robbery who acted with reckless indifference to human life. The court explained, "I have routinely denied petitions like this where a special circumstance that had the same factual predicates that would be the factual predicates under [SB] 1437 were put before the jury. If they were put before the jury, the defendant has gotten everything that [SB] 1437 mandates, which is a finding of beyond a reasonable doubt that one of the current [SB] 1437 conditions apply to the defendant." May filed a timely appeal.

II

ANALYSIS

May argues the trial court had no discretion to review the record of conviction when determining whether he had stated a prima facie claim for relief but was limited to the allegations in his petition. In addition, he argues that even if the court could look beyond his petition to the record of conviction, the evidence is insufficient to support a finding that he acted with reckless indifference to human life as that standard is defined in *Banks* and *Clark*. We conclude both arguments lack merit.

A. *Standard of Review and Applicable Law*

We review de novo questions of statutory construction. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.) "Our primary task 'in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.'" (*Ibid.*)

Section 1170.95 establishes the following procedure for processing petitions for relief. Section 1170.95 subdivision (a) provides that a person convicted of felony murder or murder under a natural and probable consequences theory may petition the trial court to have his or her murder conviction vacated and be resentenced on any remaining counts if the following conditions are met: (1) A charging document was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) The petitioner was

convicted of first or second degree murder following a trial or an accepted plea; and (3) The petitioner could "not be convicted of first or second degree murder because of changes to Section[s] 188 or 189" made by SB 1437. (§ 1170.95, subd. (a); see also *Lewis, supra,* 43 Cal.App.5th at p. 1136.)

Section 1170.95, subdivision (b) requires every petition to include: a declaration from the petitioner that he or she is eligible for relief under the statute, the superior court's case number and year of conviction, and a statement as to whether the petitioner requests appointment of counsel. (§ 1170.95, subd. (b)(1).) If any of the required information is missing and cannot "readily [be] ascertained by the court, the court may deny the petition without prejudice to the filing of another petition." (§ 1170.95, subd. (b)(2).)

Section 1170.95, subdivision (c) sets forth the trial court's responsibilities once a complete petition has been filed: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)

If the court issues an order to show cause, it must hold a hearing to determine whether to vacate the murder conviction. (§ 1170.95, subd. (d).) At that hearing, the prosecution has the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) The prosecutor and petitioner "may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Ibid.*)

In short, a section 1170.95 petitioner must first make a prima facie case for relief, and if they are able to do so, the trial court must issue an order to show cause and hold a hearing to determine whether to vacate the murder conviction and recall the sentence. (See, e.g., *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328 (*Verdugo*), review granted Mar. 18, 2020, S260493.) "'A prima facie showing is one that is sufficient to support the position of the party in question.'" (*Lewis*, *supra*, 43 Cal.App.5th at p. 1137, quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.)

B. *Discussion*

1. *The court properly reviewed the record of conviction*

Two opinions, *Lewis* and *Verdugo*, have already rejected the argument that a trial court is limited to the allegations in the petition when determining whether the petitioner has stated a prima facie claim for relief under section 1170.95.

In *Lewis*, the defendant argued "that the court could look no further than his petition in evaluating his prima facie showing and the court therefore erred when it considered [the] opinion in his direct appeal." (*Lewis*, *supra*, 43 Cal.App.5th at p. 1137.)

In *Verdugo*, the defendant argued "the superior court lacked jurisdiction to deny his section 1170.95 petition on the merits" based on its review of the record of conviction "without first appointing counsel and allowing the prosecutor and appointed counsel to brief the issue of his entitlement to relief." (*Verdugo, supra,* 44 Cal.App.5th at p. 323.) Analogizing to the well-established and similar resentencing procedures under Propositions 36 and 47, the *Lewis* and *Verdugo* courts rejected these arguments, concluding a trial court may consider the record of the petitioner's conviction, including documents in the court's own file and the appellate opinion resolving the defendant's direct appeal. (*Lewis,* at pp. 1137-1138; *Verdugo,* at pp. 329-330.)

The *Lewis* court reasoned: "Allowing the trial court to consider its file and the record of conviction is also sound policy. As a respected commentator has explained: 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' (Couzens et al., Sentencing Cal. Crimes, [(The Rutter Group 2019)], ¶ 23:51(H)(1),

pp. 23-150 to 23-151.)" (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138.) We agree with this view and therefore conclude the court did not err by considering the record of conviction in evaluating May's petition.

2. *The court properly denied May's petition*

Next, May argues that even if the trial court could look beyond his petition to the record of conviction, the evidence is insufficient to support a finding that he acted with reckless indifference to human life under *Banks* and *Clark*. He argues that because *Banks* and *Clark* were issued after his conviction became final, no court has analyzed the sufficiency of the evidence supporting his section 190.2, subdivision (d) special circumstance finding under the correct standard. The People argue the evidence amply supports the special circumstance finding under the principles articulated in *Banks* and *Clark*. We agree with the People.

Section 190.2 sets forth the special circumstances under which murderers and accomplices can be punished by death or life without possibility of parole. One such circumstance is when a defendant is found guilty of first degree murder committed while they were engaged in, or were an accomplice in, the commission or attempted commission of a robbery. (§ 190.2, subd. (a)(17)(A).) However, as explained above, a death resulting during the commission of a robbery (or any other felony enumerated in § 189) is insufficient, on its own, to establish a felony-murder special circumstance for those defendants, like May, who were not found to be the actual killer. Such defendants can only be guilty of special circumstance felony murder if they aid in the murder with

the intent to kill (§ 190.2, subd. (c)), or, lacking intent to kill, aid in the felony "with reckless indifference to human life and as a major participant." (*Id*., subd. (d)).

Section 190.2, subdivision (d) was enacted in 1990 to bring state law into conformity with prevailing Eighth Amendment doctrine, as set out in the United States Supreme Court's decision *Tison v. Arizona* (1987) 481 U.S. 137. (*Banks*, *supra*, 61 Cal.4th at p. 798.) "In *Tison*, two brothers aided an escape by bringing guns into a prison and arming two murderers, one of whom they knew had killed in the course of a previous escape attempt. After the breakout, one of the brothers flagged down a passing car, and both fully participated in kidnapping and robbing the vehicle's occupants. Both then stood by and watched as those people were killed. The brothers made no attempt to assist the victims before, during, or after the shooting, but instead chose to assist the killers in their continuing criminal endeavors. [Citation.] The Supreme Court held the brothers could be sentenced to death despite the fact they had not actually committed the killings themselves or intended to kill, stating: '[R]eckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. [¶] The [brothers'] own personal involvement in the crimes was not minor, but rather, . . . "substantial." Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each . . . was actively involved in every element of the kidnap[p]ing-robbery and was physically

present during the entire sequence of criminal activity culminating in the murder[s] . . . and the subsequent flight. The Tisons' high level of participation in these crimes . . . implicates them in the resulting deaths.'" (*In re Ramirez* (2019) 32 Cal.App.5th 384, 393-394 (*Ramirez*), quoting *Tison*, at pp. 157-158.)

"The *Tison* court pointed to the defendant in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*) as an example of a nonkiller convicted of murder under the felony-murder rule for whom the death penalty was unconstitutionally disproportionate. Enmund was the driver of the getaway car in an armed robbery of a dwelling whose occupants were killed by Enmund's accomplices when they resisted. [Citation.] In deciding the Eighth Amendment to the United States Constitution forbids imposition of the death penalty 'on one such as Enmund' . . . , the high court emphasized that the focus had to be on the culpability of Enmund himself, and not on those who committed the robbery and shot the victims [citation]. 'Enmund himself did not kill or attempt to kill; and, . . . the record . . . does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. . . . [T]hus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment.'" (*Ramirez*, *supra*, 32 Cal.App.5th at p. 394.)

In *Banks*, the California Supreme Court described what is often referred to as the *Tison-Enmund* spectrum. "At one extreme" are people like Enmund—"the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have

had any culpable mental state." (*Banks, supra*, 61 Cal.4th at p. 800.) "At the other extreme [are] actual killers and those who attempted or intended to kill." (*Ibid.*) Section 190.2, subdivision (d) covers those people who fall "into neither of these neat categories"—people like the Tison brothers, who were major participants in the underlying felony and acted with a reckless indifference to human life. (*Banks,* at p. 800.)

Our high court articulated several factors intended to aid in determining whether a defendant falls into this middle category, such that section 190.2, subdivision (d) would apply to them. "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or *using* lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant *present at the scene* of the killing, in a position to facilitate or *prevent* the actual murder, and did his or her own actions or *inaction* play a particular role in the death? What did the defendant do after lethal force was used?" (*Banks, supra*, 61 Cal.4th at p. 803, italics added.) "No one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Ibid.*)

The defendant in *Banks* was convicted of first degree murder with a felony-murder special circumstance based on his having acted as the getaway driver for an armed robbery in which his codefendant Banks and others participated, and in which Banks shot and killed one of the robbery victims while escaping. (*Banks, supra,* 61 Cal.4th at pp. 796-797.) Considering the defendant's involvement in the robbery against the factors

just enumerated, the Court "placed [him] at the *Enmund* pole of the *Tison-Enmund* spectrum." (*Ramirez, supra,* 32 Cal.App.5th at p. 397.) The Court found particularly significant the fact the defendant played the role of getaway driver and was not aware his codefendants planned to use guns during the robbery. Because he "did not see the shooting happen, did not have reason to know it was going to happen, and could not do anything to stop the shooting or render assistance," the Court concluded he was not "willingly involved in the violent manner in which the particular offense [was] committed." (*Banks,* at pp. 801, 803, fn. 5, 807.) As a result, the Court concluded "the jury's special-circumstance true finding cannot stand." (*Id.* at p. 807.)

Not long after *Banks*, the Court revisited this issue in *Clark*, also concluding the evidence was insufficient to support the defendant's robbery-murder special circumstance findings. (*Clark, supra,* 63 Cal.4th at p. 611.) The defendant in *Clark* planned a burglary of a computer store to occur after the store was closed. According to the plan, his codefendant was to carry out the burglary armed with an unloaded gun. However, his codefendant ended up carrying a gun loaded with one bullet and fired that bullet when he unexpectedly encountered a store employee, killing her. (*Id.* at pp. 612-613.) Our high court concluded there was insufficient evidence Clark acted with reckless indifference to human life because (a) Clark was not physically present when his codefendant killed the employee and was therefore unable to intervene; (b) there was no evidence Clark knew his codefendant was predisposed to be violent; and (c) Clark planned for the robbery to take place after the store closed, and the gun was not supposed to be loaded. (*Id.* at

pp. 619-622.) In sum, the Court believed there was "nothing in [Clark's] plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Id.* at p. 623.)

May argues, and we agree, that in determining if he could be convicted *today* of first degree murder, the trial court cannot simply defer to the jury's pre-*Banks* and *Clark* factual findings that he was a major participant who acted with reckless indifference to human life as those terms were interpreted at the time. Rather, the court must determine if substantial evidence supports the jury's finding as that standard was interpreted by our high court in *Banks* and *Clark*. May argues we should follow the approach our colleagues in the Second District, Division Five recently took in *People v. Torres* (2020) 46 Cal.App.5th 1168. In that case, the appellate court concluded the trial court had erred by summarily denying the defendant's section 1170.95 petition based solely on a pre-*Banks* and *Clark* section 190.2 special circumstances finding and remanded to the trial court with directions to determine whether the trial record in the defendant's case contained sufficient evidence to support the special circumstances finding under *Banks* and *Clark*. (*Torres*, at p. 1180.)

While we do not take issue with that approach, we believe an appellate court is equally capable of determining whether a defendant's pre-*Banks* and *Clark* trial record is sufficient to support the special circumstances finding under the guidance articulated in those cases. As the court stated in *In re Miller* (2017) 14 Cal.App.5th 960, "[a] [d]efendant's claim that the evidence presented against him failed to support [a] robbery-

murder special circumstance [finding made prior to *Banks* and *Clark*] . . . is not a 'routine' claim of insufficient evidence." (*Id.* at pp. 979-980.) The "claim does not require resolution of disputed facts; the facts are a given." (*Id.* at p. 980.) Indeed, as the *Torres* court observed, "[t]he question is whether [those given facts] are *legally sufficient* in light of *Banks* and *Clark*." (*People v. Torres, supra*, 46 Cal.App.5th at p. 1180, italics added.) Rather than remand for the trial court to make that determination, we will do so now.

May argues his case is similar to *Banks* and *Clark* because his robbery did not last long, there was no evidence he or Law intended to kill the victim, the shooting appeared to be spontaneous and perhaps even accidental, and there were other people at the scene (the roommates) to aid the victim after they fled. We disagree. In our view, the most significant facts in *Banks* and *Clark* were that the defendants in those cases were not present at the scene of the robberies (and therefore could not intervene or try to minimize the violence), did not know guns would be used, and certainly did not use any guns themselves in fulfilling their roles in the crime. Those facts supported the inference that the defendants were not willingly involved in the violent manner in which the robberies were committed.

May, in contrast, was willingly involved in the violent manner of the robbery. He and Law not only broke into the victim's house at a time when most residents would be home asleep (therefore increasing the risk of violence) but they did so armed. Both May and Law then proceeded to use their guns to threaten the victim and his roommates

during the course of the robbery. Even if we assume May was the "first defendant" in the evidence the jury heard, he still watched without intervening when his accomplice pistol whipped the victim once, and minutes later tried to hit him with the gun again. Being mere feet away from his accomplice as he was threatening the victim, May could have tried to stop his violent behavior or help the victim once he had been shot, but he did neither.

We agree with the People that this sort of conduct easily meets our state's standard for what constitutes being a major participant who acted with reckless indifference to human life. Indeed, we are not aware of a single case that concludes a defendant who personally committed a robbery, used a gun, and was present for the shooting did not meet the standard in section 190.2, subdivision (d). The defendants who have been successful in petitioning for a writ of habeas corpus to have their special circumstance findings vacated under *Banks* and *Clark* are those who were not wielding guns themselves and were not present for the shooting (either because they were acting as getaway drivers or because they were involved in the planning of the crime only). (See, e.g., *In re Miller*, *supra*, 14 Cal.App.5th at p. 965 [defendant played the role of "spotter" who would select the robbery target and was not at the scene of the robbery/murder]; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1019 [defendant was involved in planning the robbery but was not at the scene of the murder]; *Ramirez*, *supra*, 32 Cal.App.5th at p. 404 [defendant acted as getaway driver and was not at the scene of the murder]; *In re Taylor* (2019) 34 Cal.App.5th 543, 559 [same].) May's conduct is clearly distinguishable.

We therefore conclude that while the trial court erred by failing to determine whether May qualified as a major participant who acted with reckless indifference to human life under *Banks* and *Clark*, the error was harmless because the record demonstrates the answer to that question is yes. As a result, we conclude the denial of May's petition was proper. (See *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419 [concluding that because "[t]he language of the special circumstance tracks the language of Senate Bill 1437 and the new felony-murder statutes," a jury's true finding on section 190.2, subd. (d) renders a section 1170.95 petitioner ineligible for relief].)

III

DISPOSITION

We affirm the order denying May's petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.